STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

vs **Supreme Court No.**

ALEXANDER JEREMY STEANHOUSE,
Defendant-Appellee.

Lower Court No. 11-11939
Court of Appeals No. 318329

PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF JURISDICTION

This court has jurisdiction to grant the People's application for leave to appeal by virtue of MCR 7.301(A)(2). The Court of Appeals' October 22, 2015 decision is clearly erroneous because it involves the same basic facts as *People v Lockridge* and yet reaches a different, contrary result. This application is timely because it is being filed within 56 days after the Court of Appeals opinion. MCR 7.305(C)(2).

STATEMENT OF QUESTION PRESENTED

I.

People v Lockridge **holds—implicitly if not explicitly—both that (a) no *Crosby* remand is justified for an unpreserved *Alleyne* error where the sentence constitutes an upward departure, and that (b) the federal "reasonableness" standard, not *Milbourn* proportionality, applies to all Michigan sentences. The Court of Appeals here contravened both holdings. Must the Court of Appeals be reversed?**

The People answer, "Yes."

Defendant would answer, "No."

STATEMENT OF FACTS

Defendant was convicted of assault with intent to commit murder and receiving and concealing stolen property under $20,000, and Judge Patricia Fresard sentenced him to 30 to 60 years for the assault and one to five years for the RCSP. This represented an upward departure of 75 months from the minimum guidelines range of 171 to 285 months' imprisonment on the AWIM conviction. Judge Fresard justified the upward departure at sentencing:

> [T]he first two factors that the prosecutor mentions the horrendous, brutal assault on this young man when [it] basically appeared [from] the facts that you thought he was somehow rendered weak or incapacitated by his drug use at that time.
>
> And the action taken by you towards a person who considers you a friend does substantiate the thought that you are a person without a conscience, a person who's violent and depraved and that this is an assault that is quite shocking even to people who have been in the courts for 20 and more years.
>
> The Court is going to sentence you accordingly to 30 to 60 years on the charge of assault with intent to commit murder and one to five concurrently on the charge of receiving stolen property between the amounts of [$]1,000 but less than $20,000.

5.31.12 at 36-37. Defendant did not object at sentencing to judicial factfinding in the scoring of the guidelines.

The Court of Appeals affirmed defendant's convictions, but remanded for a *Crosby* hearing, requiring Judge Fresard to reconsider her sentence in light of the "reasonableness standard rooted in the *Milbourn* principle of proportionality." This appeal ensues.

ARGUMENT

I.

People v Lockridge **holds—implicitly if not explicitly—both that (a) no *Crosby* remand is justified for an unpreserved *Alleyne* error where the sentence constitutes an upward departure, and that (b) the federal "reasonableness" standard, not *Milbourn* proportionality, applies to all Michigan sentences. The Court of Appeals here contravened both holdings. The Court of Appeals must be reversed.**

Standard of review:

Whether an intermediate appellate court has correctly applied the judicial precedent set by a higher court is a matter of law, and appellate courts review matters of law de novo. See *Lapeer County Clerk v Lapeer Circuit Judges*, 465 Mich 559, 566 (2002). Additionally, the underlying issue here is one regarding an unpreserved sentencing issue; review in such a case is for plain error. *People v Lockridge*, 498 Mich 358 (2015).

Discussion:

The Court of Appeals ignored (or at least misapplied) *Lockridge*[1] in at least two respects: (1) there is no need for a *Crosby*[2] hearing when the sentencing error

[1]The People wish to preserve the claim that *Lockridge* was wrongly decided, for the reasons given by Justice Markman in his dissent in that case. For present purposes, however, the majority opinion is controlling.

[2]*US v Crosby*, 397 F3d 103 (CA 2, 2005).

was unpreserved and the sentence imposed exceeded the guidelines, as was the case in *Lockridge* and is the case here; and (2) *Milbourn*[3] "proportionality" is different from, and incompatible with, the "reasonableness" standard imposed by *Lockridge*. Not only because the Court of Appeals clearly erred in these regards, but also because the opinion is published and has already caused confusion and division below, this court should either grant leave to appeal or peremptorily reverse the Court of Appeals.

As noted by Judge O'Connell in *People v Shank*, ___ Mich App ___ (2015), and by Judges Gleicher, Sawyer, and Murphy in *People v Masroor*, ___ Mich App ___ (2015), the per curiam opinion in this case cannot be squared with *Lockridge*. First, as articulated by Judge O'Connell's dissent in *Shank*:

> [T]he *Steanhouse* court's decision to remand in that case was contrary to the precepts of stare decisis. Like in *Lockridge*, the defendant in *Steanhouse* did not challenge the scoring of his OVs on *Alleyne* grounds. *Steanhouse*, --- Mich.App at ----; slip op at 21. As in *Lockridge*, the trial court in *Steanhouse* departed upward from the recommended sentencing range. *Id.* The *Steanhouse* court recognized that the defendant could not establish a plain error under *Lockridge*. However, the court proceeded to review the defendant's sentence and remand for resentencing anyway, directly contrary to the language of *Lockridge* providing that a defendant was not entitled to resentencing under the exact same circumstances.
>
> * * *

[3] *People v Milbourn*, 435 Mich 630 (1990).

> A remand under *United States v. Crosby*, 397 F 3d 103 (CA 2, 2005), is necessary to determine whether prejudice resulted from an error. *People v. Stokes*, --- Mich.App ----; --- NW2d ----; (2015) slip op at 11. The *Lockridge* court stated that no prejudice could result from the type of "error" involved in this case. Shank cannot show plain error; therefore, he is not entitled to relief. I conclude that a *Crosby* remand is not appropriate or necessary in this case.

Shank, O'Connell, dissenting).

There is no reason to remand for a *Crosby* hearing in this case, because the *Alleyne*[4] error was unpreserved and the sentence constituted an upward departure.[5] But because *Steanhouse* is a published opinion, it is creating unnecessary *Crosby* hearings at the rate of about one per week. See *People v Salami*, unpublished per curiam opinion of the Court of Appeals, No. 323073 (dated December 10, 2015); *People v Gatzke*, unpublished per curiam opinion of the Court of Appeals, No. 322501 (dated December 1, 2015); *People v Masroor*, ___ Mich App ___ (2015); *People v Bozik*, unpublished per curiam opinion of the Court of Appeals, No. 322869 (dated November 24, 2015); *People v Shank*, ___ Mich App ___ (2015); *People v Beck*, unpublished per curiam opinion of the Court of Appeals, No.

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[4] *Alleyne v US*, 570 US ___; 133 S Ct 2151 (2013).

[5] Besides the obvious *Lockridge* error, there are two corresponding problems with the *Crosby* remand here: (1) a trial judge may not declare his own sentence disproportionate, according to *People v Wybrecht*, 222 Mich App 160 (1997), which is what the trial judge here has been ordered to consider on remand; and (2) proportionality has always been part of a departing sentencing court's calculus and so it must be assumed that Judge Fresard already considered that factor. See *People v Babcock*, 469 Mich 247 (2003); *People v Smith*, 482 Mich 292, 299-300 (2008).

321806 (dated November 17, 2015); *People v Grace*, unpublished per curiam opinion of the Court of Appeals, No. 322653 (dated November 17, 2015). *Steanhouse* must be reversed on that basis.

More perniciously, *Steanhouse* adopted the *Milbourn* proportionality review that *Lockridge* at least implicitly eschewed. Again, other judges in the Court of Appeals have recognized this error:

> Indeed, proportionality review as applied in *Milbourn* undercuts our Supreme Court's holding in *Lockridge* that the guidelines are now truly advisory and not mandatory. In *Milbourn*, the Supreme Court cabined a sentencing judge's discretion to depart by urging that the guidelines should almost always control[.]
>
> * * *
>
> By contrast, the *Lockridge* Court repeatedly highlighted that its decision is rooted in the right to jury trial enshrined in the Sixth Amendment, *Lockridge*, --- Mich. ----; slip op at 6, 11, 16, and that the imposition of a mandatory minimum sentence predicated on judicial fact-finding violates the Sixth Amendment. *Id.* at 11. Because judge-found facts usually control guidelines' scoring, we question whether *Steanhouse* and *Lockridge* can be reconciled.

Masroor, supra.

When in *Lockridge* this court cited *US v Booker*, 543 US 220, 125 SCt 738 (2005), it was a signal to the bench and bar that federal-style reasonableness review applies to Michigan sentences. But *Milbourn* proportionality is inconsistent with federal practice. As the US Supreme Court noted in *Gall v US*, 552 US 38, 46; 128

S Ct 586, 594 (2007), "the Court of Appeals' rule requiring 'proportional' justifications for departures from the Guidelines range is not consistent with our remedial opinion in *United States v. Booker*." *Gall*, 552 US at 46; 128 S Ct at 594. In essence, proportionality review is too constricting on the sentencing court, re-implicating the Sixth Amendment.

To the contrary, the proper sentencing practice that follows under *Lockridge*, and which this court should grant leave here to articulate, is amply described by the Court in *Gall*:

> Regardless of whether the sentence imposed is inside or outside the Guidelines range, the appellate court must review the sentence under an abuse-of-discretion standard. It must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range. Assuming that the district court's sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard. When conducting this review, the court will, of course, take into account the totality of the circumstances, including the extent of any variance from the Guidelines range. If the sentence is within the Guidelines range, the appellate court may, but is not required to, apply a presumption of reasonableness. *Id.*, at 347, 127 S.Ct. 2456. But if the sentence is outside the Guidelines range, the court may not apply a presumption of unreasonableness. It may consider the extent of the deviation, but must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance. The fact that the appellate court might reasonably have

> concluded that a different sentence was appropriate is insufficient to justify reversal of the district court.

Gall, 128 S Ct at 597.

Given the discrepancies between *Lockridge* and *Steanhouse*, and the system-wide error *Steanhouse* has introduced into Michigan's sentencing framework, this Court should grant leave or, alternatively, peremptorily reverse.

RELIEF

THEREFORE, the People request this Honorable Court to (a) grant the People's application for leave to appeal, or (b) peremptorily reverse the Court of Appeals.

Respectfully submitted,

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